Date: February 25, 1998

Case No.: 96-INA-00393

In the Matter of:

RAILROAD SALVAGE COMPANY OF CONNECTICUT, INC.,
Employer

On Behalf Of:

MOHAMMAD HAKIM,
Alien

Appearance: Marsha Edelman, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 10, 1995, Railroad Salvage Company of Connecticut, Inc. ("Employer") filed an application for labor certification to enable Mohammad W. Hakim ("Alien") to fill the position of Manager, Retail Store (AF 216). The job duties for the position are:

> Manage retail store selling general merchandise. Hire, fire, train and supervise employees. Assign workers work schedules and specific tasks. Order merchandise. Establish pricing policies. Oversee inventory. Reconcile cash and sales receipts, maintain financial records and payroll records. Handle customer complaints.

The requirements for the position are two years of experience in the job offered. Other Special Requirements are: must speak Spanish.

The CO issued a Notice of Findings on February 12, 1996 (AF 11-15), proposing to deny certification on the grounds that the Employer's requirement that applicants must speak Spanish is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(6) and § 656.21(b)(2). The CO notified the employer that it must submit documentation to establish the business necessity of the language requirement, or delete the requirement and readvertise.

In its rebuttal, dated March 15, 1996 (AF 6-10), the Employer contended that the requirement that applicants speak Spanish is a business necessity. The Employer submitted a letter from R.W. Vine, the President of the Railroad Salvage Company of America, which stated that the store in Meriden, Connecticut, is located in a largely Spanish-speaking area, that his company advertises in a Spanish language newspaper and on Spanish language radio and television stations. Mr. Vine further noted that 60% of their customers speak Spanish, but that dropped to 40% when the Spanish-speaking manager left. He stated that there has been a loss in productivity from Spanish-speaking employees without a Spanish-speaking manager, and that the manager will use the Spanish language 50 to 60% of the time.

The CO issued the Final Determination on April 18, 1996 (AF 3-5), denying certification because the Employer failed to adequately document the business necessity of the Spanish language requirement in violation of § 656.21(b)(2).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On April 30, 1996, the Employer requested review of the denial of labor certification (AF 1-2). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable. See also *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*). The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

In the instant case, the CO correctly found that the Employer's requirement for the ability to speak Spanish was unduly restrictive as it is not normally required for the position of Manager, Retail Store, under the guidelines of the *Dictionary of Occupational Titles*. The CO notified the Employer that it must establish the business necessity of the requirement by providing documentation that a substantial portion of its business is conducted in Spanish, and that a non-Spanish speaking individual could not perform the job (AF 13).

The Board has held that an employer's clients' preference to do business in a foreign language supports a finding of business necessity where the employer has established that it would lose a significant portion of its business. See *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991); *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Jung Gil Choi, C.P.A.*, 88-INA-254 (Mar. 27, 1990). However, in all those cases the employers established that the foreign language requirement had a direct bearing on the nature of their respective businesses (*Mr. Isak Sakai* (import-export of antiques); *Raul Garcia, M.D.* (doctor/therapist); *Jung Gil Choi, C.P.A.* (tax accountant)). The Board has not quantified what "significant" portion of foreign-speaking clients justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics*, 88-INA-416 (July 30, 1990) (*en banc*); *Chris and Cary Enterprises*, 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak Sakai*, *supra)*. The Board has also held that where the employer is credible and offers evidence that at least a significant portion of its clients are foreign speaking, it need not document that they comprise a particular percentage. *Raul Garcia, M.D.*, *supra.*

In rebuttal, the Employer stated that 60% of its customers are Spanish speaking, that has dropped to 40% because there was no Spanish-speaking manager, which also resulted in a loss of productivity in Spanish-speaking employees (AF 8-9). Although the Employer's statements must be considered, here, the Employer has provided no advertisements, fliers, lists of customers or employees, customer affidavits, or documentation of any kind to support its statements. See *Raul Garcia, M.D., supra*; *Coker's Pedigreed Seed Co., supra; Harlan Sprague Dawley, Inc.*, 94-INA-484 (May 28, 1996); *Pacific Southwest Landscape*, 94-INA-483 (Apr. 11, 1996). The Employer's rebuttal evidence does not provide any kind of specific information regarding the total number of clients, what percentage of those clients can only speak Spanish, the total number of employees, how the Employer has dealt with, and is currently dealing with, the Spanish-speaking segment of its business. In addition, the Employer has not established that the foreign language requirement has a direct bearing on the nature of its business of selling general merchandise in a shopping mall. See *Mr. Isak Sakai, supra*; *Raul Garcia, M.D., supra*; *Jung Gil Choi, C.P.A., supra*; *Western Electric Supply Company*, 94-INA-248 (Nov. 7, 1995). Without some supporting documentation, the statements by the Employer are merely unsupported assertions and conclusions and cannot carry the Employer's burden of proving business necessity. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 87-INA-686 (Feb. 17, 1989).

We find that the Employer has not adequately documented the business necessity of the language requirement of speaking Spanish, and thus, has failed to rebut the CO's finding of a violation pursuant to 20 C.F.R. § 656.21(b)(2). The CO's denial of labor certification is, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.